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IN THE
COURT OF APPEALS OF INDIANA

LONNIE K. STEPHENS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 05A02-0601-CR-67
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Bruce C. Bade, Judge
Cause No. 05C01-0312-FB-52

September 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Lonnie Stephens ("Stephens") challenges his twenty-year sentence for Attempted Criminal Deviate Conduct, a Class B felony,[1] enhanced by ten years because he is a repeat sexual offender. We affirm.

Issue

Stephens presents a single issue for review: whether his aggregate thirty-year sentence was imposed in violation of the United States Constitution or the Indiana Constitution because he was twice punished for a single prior Attempted Rape conviction.

Facts and Procedural History

On November 1, 2003, Stephens knocked at the door of his neighbor, M.J., and asked to use her telephone because there was an emergency. M.J. retrieved a cordless telephone for Stephens, and when she turned around, she saw Stephens enter her apartment and lock the door.

Stephens grabbed M.J.'s shirt and threw her against a wall. He put his hands under her shirt and pinched her breasts. Stephens told M.J. that he had been watching her, and that he was "going to fuck her" because his girlfriend was sick and he "had to have sex somewhere." (Tr. 156.) Stephens held M.J. against the wall and placed his hand down her pants and inside her underwear. He attempted to digitally penetrate M.J.'s vagina. Stephens also exposed his penis, and demanded oral sex. M.J. kneed Stephens in the groin area, and he dropped to the floor. M.J. then ran into her kitchen and retrieved a butcher knife. Stephens left M.J.'s apartment, but was arrested later that day.

On December 15, 2003, Stephens was charged with Attempted Criminal Deviate Conduct, Failure to Register with the Indiana Sexual Offender Registry, a Class D felony,[2] and Sexual Battery, a Class D felony.[3] The State also alleged that Stephens was a repeat sexual offender. The charge of Failure to Register was severed and Stephens was brought to trial on the remaining charges on November 1, 2005. On November 2, 2005, the jury found Stephens guilty of Attempted Criminal Deviate Conduct and Sexual Battery. On November 3, 2005, Stephens was adjudicated a repeat sexual offender.

On November 28, 2005, Stephens was sentenced to twenty years imprisonment for Attempted Criminal Deviate Conduct, enhanced by ten years because of his adjudication as a repeat sexual offender.[4] This appeal ensued.

Discussion and Decision

Stephens contends that this Court should vacate his aggregate thirty-year sentence and remand for the imposition of a sentence not to exceed twenty years. The trial court enhanced Stephens' ten-year presumptive sentence for a Class B felony based upon the aggravating circumstance of his criminal history. See Indiana Code Section 35-50-2-5. The twenty-year sentence was then enhanced by ten years due to his adjudication as a repeat sexual offender. See Indiana Code Section 35-50-2-14(d).

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[1] Ind. Code §§ 35-42-4-2(a), 35-41-5-1.
[2] Ind. Code § 5-2-12-9.

[3] Ind. Code § 35-42-4-8(a)(1).

[4] Concluding that the Sexual Battery and Attempted Criminal Deviate Conduct charges arose out of the same conduct, the trial court declined to enter a judgment of conviction upon the Sexual Battery verdict.

Stephens first claims that his sentence violates the Double Jeopardy Clause of the United States Constitution. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution embodies three separate but related prohibitions; specifically, a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after a conviction and multiple punishments for the same offense. Nunn v. State, 695 N.E.2d 124, 125 (Ind. Ct. App. 1998). Here, the third circumstance is implicated.

In Blockburger v. United States, 284 U.S. 299 (1932), the United States Supreme Court articulated the test to determine whether a defendant received multiple punishments for the same offense. The Blockburger test, known as the "same elements" test, requires only that we look to the statutory elements of the charged offenses to determine whether each provision requires proof of an additional fact which the other does not. Bracksieck v. State, 691 N.E.2d 1273, 1274 (Ind. Ct. App. 1998). If so, the offenses are not the "same offense" for federal double jeopardy purposes. Id.

To convict Stephens of Attempted Criminal Deviate Conduct, as charged, the State was required to prove beyond a reasonable doubt that he attempted to compel M.J. by force or imminent threat of force to perform or submit to deviate sexual conduct. Ind. Code § 35-42-4-2(a). Deviate Sexual Conduct is "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9. To establish that Stephens is a Repeat Sexual Offender, the State was required to prove beyond a reasonable doubt that he had accumulated

one prior unrelated felony conviction for a sex offense under Indiana Code Section 35-42-4-1 through Section 35-42-4-9 or Indiana Code Section 35-46-1-3. See Ind. Code § 35-50-2-14.

Stephens' adjudication as a repeat sexual offender requires proof of a prior sexual offense, while his conviction of Attempted Criminal Deviate Conduct does not. However, Stephens claims that his prior Attempted Rape conviction became an element of the crime of Attempted Criminal Deviate Conduct because the trial court relied upon the prior conviction to aggravate his sentence. He argues that "prior convictions used to enhance sentences are now constitutionally required to be considered as elements of the charged crime." Appellant's Br. at 9. In support of this proposition, he cites Apprendi v. New Jersey, 530 U.S. 466 (2000), wherein the Court reviewed the sentence imposed for a "hate crime" and treated the requisite "biased purpose" as mens rea, an element of the crime to be tried to the jury, as opposed to considering it to be a "sentencing factor" as urged by the State of New Jersey. See id. at 492-93.

The United States Supreme Court held in Apprendi that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Prior convictions were expressly excluded from the Apprendi holding. Moreover, the Apprendi Court declined to overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). In Almendarez-Torres, the Court rejected the petitioner's constitutional claim that his recidivism must be treated as an element of his offense. Id. at 247. In reaching that decision, the Court quoted Graham v. West Virginia, 224 U.S. 616, 629 (1912):

"recidivism does not relate to the commission of the offense but goes to the punishment only." Id. at 244. The Almendarez-Torres Court also reiterated the language of Graham with regard to double jeopardy concerns: "the sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes." Id. (quoting Graham, 224 U.S. at 623-24). Accordingly, the recidivist-sentencing factor here at issue did not constitute a separate element of his crime for constitutional purposes, and Stephens' reliance upon Apprendi to establish a federal double jeopardy violation is misplaced.

Stephens next claims that his sentence violates the double jeopardy clause of the Indiana Constitution, Article I, Section 14, as well as the common law prohibition against sentence enhancement based upon the same fact that comprises an element of the charged crime. To determine whether two convictions are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, we evaluate whether, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Collins v. State, 717 N.E.2d 108, 109 (Ind. 1999).

In the first phase of the bifurcated trial, the State introduced evidence to prove that Stephens attempted to digitally penetrate M.J.'s vagina, and was thus guilty of Attempted Criminal Deviate Conduct. In the second phase, the State introduced evidence solely to prove that Stephens had previously been convicted of Attempted Rape. See e.g., Smith v. State, 825 N.E.2d 783, 784 (Ind. 2005) (stating "the only facts at issue in determining repeat sexual offender status are a defendant's prior convictions.") As such, the State did not rely

upon the same evidentiary facts to establish both the Attempted Criminal Deviate Conduct charge and the Repeat Sexual Offender allegation. Stephens has demonstrated no violation of Article I, Section 14 of the Indiana Constitution.

Stephens also quotes Stone v. State, 727 N.E.2d 33, 37 (Ind. Ct. App. 2000) for the rule of common law that "a fact that comprises a material element of the offense may not also constitute an aggravating circumstance to support an enhanced sentence." His ensuing argument presupposes that his prior conviction for Attempted Rape is an element of his current offense pursuant to Apprendi, a contention we have earlier rejected.

Finally, it is apparent from the sentencing record that the 1987 Attempted Rape conviction does not comprise the totality of Stephens' criminal history that could have been considered by the trial court at sentencing. In 1999, Stephens was charged with Sexual Battery and entered a plea of guilty to Battery. In 2000, he violated a condition of his probation. He also had criminal charges for non-support of a dependent pending at the time of the instant trial. Thus, the trial court could have imposed upon Stephens an aggravated sentence without considering his Attempted Rape conviction.

In light of the foregoing, Stephens has not established double jeopardy or common law grounds for the vacation of his aggregate thirty-year sentence.

Affirmed.

RILEY, J., and MAY, J., concur.